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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STEVEN MEDVIK,
Petitioner,

vs.

CITY OF UNIVERSITY CITY, MISSOURI, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents, City of University City, Missouri, and Frank Ollendorff, City Manager for the City of University City, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Eighth Circuit reported as *Medvik v. City of University City*, No. 92-3450EM, slip op., (8th Cir. June 15, 1993). Petitioner's earlier action for review of his discharge is reported as *Medvik v. Ollendorff*, 772 S.W.2d 696 (Mo. App. 1989), *cert. denied*, 493 U.S. 1071 (1990).

STATEMENT OF THE CASE

The City of University City discharged Petitioner from his job as a mechanic because Petitioner repeatedly called a fellow employee a "nigger." This was the fourth occasion in five years on which the Petitioner had been disciplined—two of which involved racial slurs. The discharge was predicated, in part, on a workplace rule that permits discipline for "[a]n incident involving an unwarranted or imprudent statement to a coworker of a sexual, racial, ethnic, or religious nature." *Medvik*, 772 S.W.2d at 698.

Petitioner administratively appealed his discharge and, following affirmance by the City Manager, sought judicial review in the Circuit Court for the County of St. Louis, Missouri. Petitioner alleged that the disciplinary action violated his First and Fourteenth Amendment rights because, among other reasons, the action was predicated upon a workplace rule that was vague and indefinite and offended Petitioner's rights to due process and freedom of speech. The Circuit Court affirmed the administrative action, and that decision was later affirmed by the Missouri Court of Appeals. Transfer or review by the Missouri Supreme Court was denied, and Petitioner's Petition for Writ of Certiorari to the United States Supreme Court was also denied. *Medvik v. Ollendorff*, 493 U.S. 1071 (1990).

On July 15, 1991, Petitioner then filed the instant action pursuant to 42 U.S.C. § 1983. Petitioner again alleged that his termination by the City of University City violated his First and Fourteenth Amendment rights because the workplace rule applied to Petitioner was "vague and indefinite . . . violated his freedom of speech" and denied Petitioner due process of law. The United States District Court for the Eastern District of Missouri found that the action was barred by Petitioner's prior litigation, and this determination was affirmed by the United States Court of Appeals for the Eighth Circuit.

REASONS WHY THE WRIT SHOULD BE DENIED

I. RES JUDICATA WAS PROPERLY APPLIED TO BAR RELITIGATION.

Petitioner asserts that res judicata should not apply to bar relitigation of the same claims decided in state court proceedings if it is alleged that the cause involves state law that is facially unconstitutional. Petitioner asks this Court to find that 42 U.S.C. § 1983 constitutes a statutory exception to the requirement of full faith and credit mandated by 28 U.S.C. § 1738 for state court decisions.

This Court has specifically stated that "an exception to Section 1738 will not be recognized unless a later statute contains an expressed or implied partial repeal," and "Congress must clearly manifest its intent to depart from Section 1738." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468, 477 (1982). The Court has further stated that "[t]here is 'simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata'." *Federated Department Stores, Inc. v. Motie*, 452 U.S. 394, 401 (1981), *quoting Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

Petitioner relies on 42 U.S.C. § 1983 as a statutory exception to the mandate of full faith and credit for Section 1738. However, this Court has already unequivocally held that Section 1983 does not implicitly or explicitly repeal the statutory mandate of Section 1738 for full faith and credit to be provided to state court decisions. *Allen v. McCurry*, 449 U.S. 90 (1980). As stated in *Allen*, 449 U.S. at 97-98:

> [N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the statutory requirements of the predecessor of 28 U.S.C. § 1738 . . .. Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state court judgments.

See also Migra v. Warren City School District, Board of Education, 465 U.S. 75, 80-85 (1984).

Petitioner cites no appellate decisions or decisions of this Court to support its contention. Instead, Petitioner relies on the *dissent* in *Allen v. McCurry*, which is plainly misplaced. A reading of the majority and dissenting opinions indicate that a critical issue dividing the Court was precisely the preclusive effect to be provided a state court decision which erroneously applied federal law. Although the majority notes that Section 1983 was designed to "provide a federal remedy where state's substantive law was facially unconstitutional," 449 U.S. at 100-01, the majority opinion repudiated the dissent's claim that this "intent" should be sufficient to allow Section 1983 actions to serve as an exception to the statutory mandate of 28 U.S.C. § 1738 for "full faith and credit" and claim preclusion:

> This understanding of Section 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, will be essentially the same as the important general limit on rules of preclusion that already exist: collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. **But the Court's view of Section 1983 in *Monroe* lends no strength to any argument that Congress intended to allow the relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.**

449 U.S. at 101. [Citation omitted and emphasis added].

In short, a proper reading of *Allen* repudiates Petitioner's contention. As Petitioner notes, the court in *Allen* did recognize the tripartite intent of Congress in enacting Section 1983, as stated in *Monroe v. Pape*, 365 U.S. 167 (1961). 449 U.S. at 100-01. But the Court rejected the claim that a challenge under Section 1983 predicated upon facial unconstitutionality is sufficient to provide an exception to the statutory mandate for res judicata. Accordingly, this Court held that Section 1983 did not implicitly repeal the statutory mandate for full faith and credit to be provided prior state court decisions pursuant to 28 U.S.C. § 1738 even if the underlying claim involved the facial unconstitutionality of a state statute or regulation.

Petitioner's novel exception for Section 1983 actions involving claims of facial invalidity also clashes with a substantial body of appellate decisions. In *Piska v. City of Stevens Point, Wisconsin*, 823 F.2d 1168, 1172-74 (7th Cir. 1987), the court rejected an attempt to challenge the facial validity of an ordinance in a Section 1983 action in light of the prior state court litigation. Similarly, in *Willhauck v. Halpin*, 953 F.2d 689, 704-06 (1st Cir. 1991), the court found a Section 1983 challenge to a local ordinance to be barred by the full faith and credit requirement owed to prior state court decisions. In *Corpus Christi Taxpayers v. Corpus Christi, Texas*, 858 F.2d 973, 976 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989), res judicata was also found to bar a federal action challenging the constitutionality of a tax ordinance whose validity had already been litigated in state court proceedings.

In each of these appellate decisions, the statutory mandate of 28 U.S.C. § 1738 was applied to bar Section 1983 actions challenging the facial validity of an allegedly unconstitutional ordinance that was the subject of prior state court litigation. In each of these decisions, the courts unequivocally held that the full faith and credit requirement of 28 U.S.C. § 1738 barred the federal action. *Accord Richardson v. City of South Euclid*, 904

F.2d 1050, 1052 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 691 (1991); *Lester v. Lavrich*, 784 F.2d 193, 196 (6th Cir. 1986).

Nor does it serve public policy to craft the exception that Petitioner seeks to create in this appeal. Petitioner had a full and fair opportunity to litigate his constitutional claims in the state courts of Missouri and even petitioned for *certiorari* to the United States Supreme Court. The Missouri courts carefully considered his constitutional claims and found them wanting. Simply because Petitioner disagrees with the analysis and conclusions of the Missouri courts should not mean that he can now relitigate stale claims in federal courts. "The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Federated Department Stores, Inc.*, 452 U.S. at 401.

II. *R.A.V.* DOES NOT OVERRULE THE PRIOR MISSOURI DECISIONS.

R.A.V. v. City of St. Paul, 505 U.S. ___, 120 L.Ed.2d 305 (1992), does not overrule the Missouri decision. In the prior adjudication, the Missouri Court of Appeals applied rules developed by this Court to govern speech in the workplace. The Court found that a racial epitaph was not a matter of public concern under *Connick v. Myers*, 461 U.S. 138 (1983), and, therefore, officials enjoy a wide latitude in imposing discipline for such statements. *Medvik v. Ollendorff*, 772 S.W.2d 696, 702 (1989). The Court also found that, even if the balancing test prescribed in *Pickering v. Board of Education*, 391 U.S. 563 (1968), was to be applied, the disruptive effect of an employee's use of an inflammatory, racial epitaph outweighed any First Amendment protection to be afforded racial epitaphs.

R.A.V. does not alter these principles. Neither *R.A.V.*'s holding nor the majority's discussion of the applicable principles explicitly or implicitly overrules the well-established precedent governing speech in the workplace. Nothing in *R.A.V.* provides

that the traditional balancing test articulated in *Pickering* and later employed in *Connick* is to be abandoned. Instead, *R.A.V.* simply fails to address the issue of workplace regulation of speech, leaving intact the governing law that provides that speech in the workplace is regulated on the basis of its content given the competing concerns for freedom of expression and governmental efficiency and competency.

It is not surprising that *R.A.V.* fails to address speech in the workplace. This Court has repeatedly recognized that restrictions that might violate constitutional rights in other contexts are not controlling when the same conduct occurs in the workplace. Thus, the Court has upheld limitations on partisan political activity in the workplace that could not be imposed upon the public generally. *United States Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973). Because of the unique needs of the workplace, "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general'." *Id.* at 564, *quoting Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Similarly, the government may subject its employees to warrantless searches and drug testing that cannot be imposed upon the public generally. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *O'Connor v. Ortega*, 480 U.S. 707, 717 (1987). "[T]he 'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and coworkers that might be viewed as unreasonable in other contexts." *National Treasury Employees Union*, 489 U.S. at 671, *quoting O'Connor* at 717. Most importantly, the Court has repeatedly recognized that the government may restrict certain speech in the workplace that it cannot regulate generally. *Pickering*, 391 U.S. at 568. As Justice Scalia has stated, "[w]e have, however, recognized that the government's power as an employer to make hiring and firing decisions on the

basis of what its employees say has a much greater scope than its power to regulate expression by the general public." *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting).

As a result, *R.A.V.* cannot be read to repudiate the balancing test that is to be employed to evaluate speech and conduct in the workplace. *R.A.V.* does not overrule the established precedent relied upon by the Missouri Court of Appeals in ruling in favor of Respondents.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that this Court deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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